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MPIfG Discussion Paper 04/11

Legislative Autolimitation under Divided Government
Evidence from the German Case, 1976–2002

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MPIfG Discussion Paper 04/11
Max-Planck-Institut für Gesellschaftsforschung Köln
Max Planck Institute for the Study of Societies Cologne
November 2004

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MPIfG Discussion Paper | ISSN 0944-2073

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Abstract

Most efforts to detect the consequences of divided government in German federalism by analyzing legislative statistics have been unsuccessful. Therefore, there is still much debate in Germany about the gridlock potential of divided government, as there is in the United States. Using a game-theoretic model, this paper investigates the impact of divided government on the strategic choices of government and opposition. The main conclusion of our model is that a strong opposition dominance in the Bundesrat usually does not lead to open party-political conflict, but rather to legislative autolimitation of the government which anticipates the opposition's veto potential. However, if majorities in the Bundesrat are narrow, both government and opposition opt for less moderate policy positions, and as a result legislation is characterized by intense party-political conflict. The hypotheses following from the model are tested on a detailed data set comprising all legislative activity in Germany between 1976 and 2002. The results confirm the thesis that the main effect of divided government is that it induces 'legislative autolimitation' on the part of the government. We conclude that when majorities in the Bundestag and Bundesrat diverge, the impact on legislation is substantial.

Zusammenfassung

Die politikwissenschaftlichen Bemühungen, das Blockadepotential des deutschen Föderalismus in der Gesetzgebungsstatistik nachzuweisen, blieben bisher weitgehend erfolglos. Entsprechend blieb der Einfluss des Bundesrates auf die Gesetzgebung bei entgegenlaufenden Mehrheiten zwischen Bundestag und Bundesrat umstritten. Anknüpfend an diese Debatte entwickelt dieser Beitrag ein spieltheoretisches Modell, das die Auswirkung der Mehrheitsverhältnisse im Bundesrat auf die strategische Interaktion von Regierung und Opposition modelliert. Die Hauptaussage des Modells ist, dass sich deutlich entgegenlaufende Mehrheiten zwischen Bundestag und Bundesrat im Regelfall nicht in offenem parteipolitischen Konflikt niederschlagen, sondern zu gesetzgeberischer Autolimitation führen. Im Gegensatz dazu spekulieren bei knappen oder uneindeutigen Mehrheitsverhältnissen im Bundesrat sowohl die Regierung als auch die Opposition auf die Durchsetzung von weniger kompromissbereiten Positionen sowie auf eine Abstimmungsniederlage des politischen Gegners, so dass wir hier intensiven parteipolitischen Konflikt erwarten. Die sich aus dem Modell ergebenden Hypothesen werden mit Hilfe eines detaillierten Datensatzes zur deutschen Gesetzgebungstätigkeit zwischen 1976 und 2002 überprüft. Die Ergebnisse bestätigen im Wesentlichen die Autolimitationsthese des Modells und unterstreichen damit auch das erhebliche (latente) Blockadepotential des bundesdeutschen Föderalismus.

Contents

1	Introduction	5
2	Autolimitation under divided government	7
3	Empirical evidence	14
	Data	14
	Results	16
4	Conclusion	19
	Appendix	21
	References	24

1 Introduction

Divided government tends to be associated with gridlock and antagonistic party conflict. And this seems perfectly straightforward. In its simplest version the political game might be thought of consisting of a right-wing and a left-wing party and a status quo point in between. If one party has a majority in parliament while the other controls the second chamber (or, say, holds the presidency), blockage would be the expected outcome for all policies that require the assent of both, whether it be the first and second chambers or parliament and president (Tsebelis 1995; Tsebelis/Money 1997).

However, when we try empirically to identify the legislative consequences of divided government, we have a hard time finding much evidence to support these expectations. Take, for example, Germany, which might be supposed ideally suited for study of the consequences of divided government. Since 1970 German governing parties have enjoyed a majority in the *Bundesrat*, Germany's strong second chamber, in only nine out of 34 years. The German *Bundesrat* is a powerful veto player with strong co-legislation rights: it holds an absolute veto (see Article 77 of the German Basic Law) over almost 60 per cent of all federal legislation, while for the other 40 per cent or so it can exercise a suspending veto.¹ Moreover, party discipline tends to be high in Germany with the effect that diverging majorities in the *Bundestag* and *Bundesrat* regularly lead to confrontation along partisan-political lines in both chambers (Lehmbruch 2000).

However, statistics on German legislation do not contain much evidence in support of the blockage or stalemate thesis. Contrary to expectations, government initiatives usually do not fall prey to an opposition veto if majorities in parliament (*Bundestag* – BT) and second chamber (*Bundesrat* – BR) diverge. The outright failure of a legislative initiative remains very rare, under both congruent and incongruent majorities. Regularly less than three per cent ($N < 10$ per term) of all initiatives that require BR consent fail due to a second-chamber veto; and among such failed initiatives second-order, 'petty legislation' clearly dominates. The opposition almost never vetoes the big, important government reform projects in the second chamber, even if it controls enough votes to do so (Schindler 1998, section 11.8, 2433–2437). Moreover, there is evidence that in the very few cases of veto, 'blame game' strategies may have played a role – that is, in some of these cases the government may have deliberately provoked the opposition's rejection of its initiative (Groseclose/McCarty 2001). In short, in the

We thank Andreas Broscheid, Henrik Enderlein and Steffen Ganghof for helpful comments.

1 This suspending veto *de facto* turns into an absolute veto once a two-thirds BR majority votes against an initiative. Parliament's override would then also require a qualified majority of two-thirds of all seats (Article 77, section 4). Within Germany's PR election system this supermajority would only be secured in the event of a 'grand coalition' between Social Democrats and Christian Democrats, like the one that ruled between 1966 and 1969. However, a two-thirds veto in the BR itself would then be extremely unlikely.

German political system the opposition has many veto opportunities, but seems almost never to exploit them. This paradoxical finding of a strong veto-potential and a lack of clear evidence of its use has led to contradictory assessments of the consequences of divided government. In the German debate, gloomy (Scharpf 1985, 2004; Lehmbruch 2000) and sanguine (Benz/Hesse 1985; Sachs 1999; Renzsch 2000) views confront one another, and on the basis of the *existing* empirical evidence there is little hope that a reconciliation between the two positions can soon be reached.

The far richer US literature on the consequences of divided government has also produced ambiguous findings. In his famous article, Sundquist (1988) associated divided government with stalemate, unbroken conflict and political immobility. In his view, divided government also renders political accountability problematic – a problem that already looms large in American politics. Sundquist's article has provoked many scholarly reactions (Cox/Kernell 1991; Fiorina 2003; Mayhew 1991) in which some of the alleged negative consequences of divided government are contested. Mayhew (1991), in what is perhaps the most comprehensive challenge to Sundquist's concerns, compared the passage of significant legislation under divided and under unified government and showed that important legislation passes just as often under one as under the other. While some research supports and broadens Mayhew's findings (Jones 1994; Krehbiel 1996; Quirk/Nesmith 2000; Jones 2001; Fiorina 2003), others challenge Mayhew's conclusion on both theoretical and methodological grounds (Binder 1999; Coleman 1999; Edwards /Barrett/Peake 1997; Howell, et al. 2000; Kelly 1993). A scholarly consensus still seems far away.

This state of affairs is unsatisfactory and attempts to overcome the impasse would be welcome. In our view any such attempt requires both better theory and better data. *Theoretically*, we have to go beyond simple predictions of legislative failure or delay. As has been often emphasized in contributions to the debate (Fiorina 2003: 103) our main theoretical point of departure must be that political agents – as rational actors – anticipate the veto-potential of their adversaries. In light of this basic insight it is after all not so surprising that in the German political system divided government has not led to a large number of failed legislative initiatives. *Empirically*, this means that we cannot measure veto power directly but have to follow an indirect research strategy. In order to detect the effects of divided government – if there are any – we must seek empirical regularities in the 'anticipation of veto'. Central to this pursuit is an insight taken from the judicial review literature. Amongst other questions, this literature has asked to what extent an opposition's threat to bring a bill before the constitutional court can motivate legislative autolimitation on the part of the government (Stone Sweet 1992; Vanberg 1998). Analogously, we might ask to what extent an opposition threat to veto a bill in the second chamber might provoke government legislative autolimitation. One important insight of the judicial review literature is that if the threat is credible – that is, if the constitutional court is 'active and restrictive' – a government will accommodate the opposition's ideal position, thus avoiding any need for the court to get involved (Vanberg 1998: 312–313). Applied to our context, this means

that if the opposition enjoys a strong majority in the second chamber, a government will anticipate the opposition's veto potential when drafting legislation in order to head off any exercise of the second-chamber veto. In other words, instead of looking for outright legislative failure or delay, we should seek evidence that divided government leads to legislative autolimitation. This is what we propose to do in what follows.

For this purpose we make use of an exceptionally rich data set that allows us to test much more fine-grained hypotheses about the consequences of divided government. We analyse a data set containing information on every initiative introduced into the German parliament between 1976 and 2002 ($N = 5038$). For each initiative we have information on the duration of legislation, the initiating party, the exact legislative procedure, the ministries and committees involved, the voting results, and so on, together with information on the party composition of the second chamber at every important stage of the bill's legislative passage. To our knowledge, this complete coverage of 30 years of legislative activity in a Western parliamentary system constitutes a data set of unparalleled richness and breadth. Compared to previous studies, this data set enables us to trace the legislative consequences of any changes in the party complexion of the second chamber in much greater detail. To anticipate the general thrust of our empirical findings, they unequivocally confirm the thesis that the absence of legislative failure in situations where the opposition enjoys a strong position in the second chamber is *not* due to harmonious policy preferences between government and opposition; nor is it the result of the opposition 'behaving responsibly'. The lack of 'visible veto' is rather due to the government's anticipation of the opposition's veto, which in advance forces the government to incorporate the opposition's ideal standpoint in its own legislative initiatives – or motivates the government to give up an initiative altogether. In other words, we find ourselves in broad agreement with the basic finding of the judicial review literature. The importance of divided government, like that of judicial review, 'lies in its indirect, anticipatory effects' (Vanberg 1998: 300).

The present paper is structured as follows. In Section 2 we sketch a simple model of the strategic interaction between government and opposition in a bicameral system under divided government. From this model we derive a number of – sometimes quite counter-intuitive – hypotheses that are open to empirical testing. In Section 3 we describe our data set and present our evidence. Section 4 concludes.

2 Autolimitation under divided government

In a situation of divided government the government does not have a majority in the second chamber, and the opposition can threaten to veto a bill in order to extract policy concessions. The government's response will depend on the threat's credibility. If the opposition enjoys a strong position in the second chamber, the government will

be willing to compromise in order to secure safe passage of its bill. Governments usually have an interest in avoiding complete legislative failure because, apart from anything else, failure ‘looks bad’ in front of the electorate, giving the impression that the government is unable either to get its preferred policies through or correctly to assess what kinds of policy it could get through (Huber 1996; Heller 2001). In other words, the government looks either powerless or inept. We assume that legislative failure can have – at times very significant – electoral costs.² By implication, if a government would need to sacrifice ‘too much’ of its policy position in order to avoid legislative failure it might prefer to refrain from introducing the bill in the first place. However, the opposition’s threat is itself not costless. If an opposition threatens to exercise its veto, but, when it comes to the crunch, fails to deliver a majority in the second chamber, the opposition may itself pay a significant electoral price. In this case it would be the opposition that looked weak and/or incompetent.

When a government decides to introduce a bill, therefore, it must take the following considerations into account. With a moderate bill, the probability of an oppositional veto is low, but this comes at the price of a policy that is further away from its own ideal point. Whenever the opposition is not in a particularly strong position to exercise its veto, the government might be tempted to weigh the risk of legislative failure against the probability of getting a less moderate bill through, *plus* striking a blow at the opposition’s credibility. The opposition, in turn, needs to make the following calculation: a veto threat might motivate the government to compromise and introduce a more moderate bill. However, if the government continues with a more robust bill, a successful veto would both prevent this policy from being enacted (save the status quo point) and, at the same time, damage the government’s political reputation. An unsuccessful veto, however, would leave the opposition with a policy less to its liking, plus a significant political ‘loss of face’.

In our view, this stylized account quite accurately captures the basic strategic calculations of government and opposition within the German political system. Germany’s second chamber, the Bundesrat, is composed of representatives of 16 state governments. These state governments have between three and six seats, depending on population size. Votes cannot be split, but have to be cast *en bloc*. The Bundesrat enjoys rights of co-legislation on almost all major policy issues. Any federal bill which affects the states’ revenue or administration needs the approval of the second chamber (*Zustimmungsgesetze*). Today this applies to almost 60 per cent of all legislation. For the other 40 per cent or so (*Einspruchsgesetze*) the BR can only issue a suspending veto, which may be overruled in parliament with an absolute majority (see above). In other words, in contrast to the ‘separation of jurisdiction’ federalism of the United States or Switzerland, German federalism is characterized by federal responsibilities in

2 In our analysis we do not take ‘blame games’ between government and opposition into account (Groseclose/McCarty 2001). For more on this point see the discussion below.

all major fields of legislation, while at the same time granting states far-reaching rights of co-legislation.

How does this system of joint decision-making (Germany's so-called 'cooperative federalism') interact with the party system? With minor exceptions, the parties that compete against each other at the national level are also pitted against each other at the state level. Moreover, due to the fact that all major legislative responsibilities are federal, voters usually do not distinguish between national and regional parties and politics (Chhibber/Kollman 2004). Therefore, state elections are often national 'barometer elections' (Anderson/Ward 1996) in which national issues and debates strongly influence election outcomes. Federal government parties regularly suffer losses in the state elections in almost the same manner as the party of the US president loses votes in the mid-term elections to Congress (Burkhart 2004). This 'midterm loss' gives rise to the frequent 'divided government' situations that have characterized German politics in the last three decades. Given Germany's integrated party system, with its high degree of party discipline, the voting behaviour of state governments in the second chamber has a very strong party-political flavour (Scharpf 1988; Lehmbruch 2000), but party conflict in parliament is not simply mirrored in the second chamber. At least two important factors intervene:

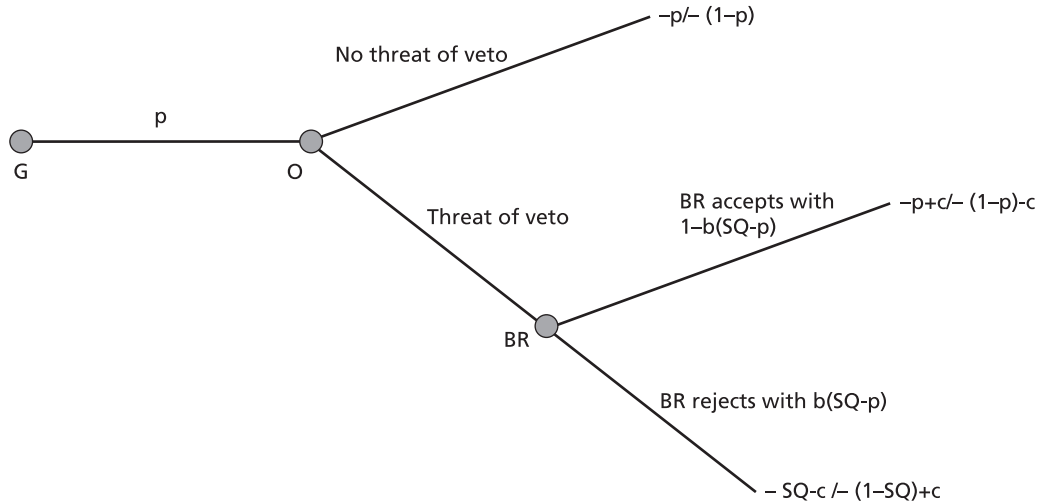
- *first*, state governments may deviate from the party line because of special state interests, and federal governments frequently appeal to the specific interests of pivotal states in order to form a majority in the Bundesrat;
- *second*, due to the PR electoral system coalitions usually govern at both the federal and the state level. However, the voting behaviour of the so-called 'incongruent coalitions' in the second chamber – that is, state coalitions formed of parties which at the federal level confront each other as government and opposition – is often hard to predict.

These two factors leave government and opposition in considerable uncertainty about the vote cast in the second chamber, which is crucial for the strategic choices of both players. We shall now describe these strategic choices more formally. We do so by presenting a simplified version of the 'abstract review' game in Vanberg (1998).

The 'compromise or confrontation' game that we propose has the following features. We assume two actors, a government and an opposition. Both have Euclidian preferences within a one-dimensional policy space (a policy line). We assume – for the sake of simplicity – that the government's ideal point is located at 0 and the opposition's ideal point is located at 1 with the SQ point in between ($0 < SQ < 1$), the scenario most favourable to the well-known gridlock or stalemate thesis.³ The government

3 We also think that this scenario is the most plausible one in the context of the German party system with two dominating left and right parties, the SPD and CDU/CSU.

Figure 1 Extensive form of the “compromise or confrontation” game between government and opposition

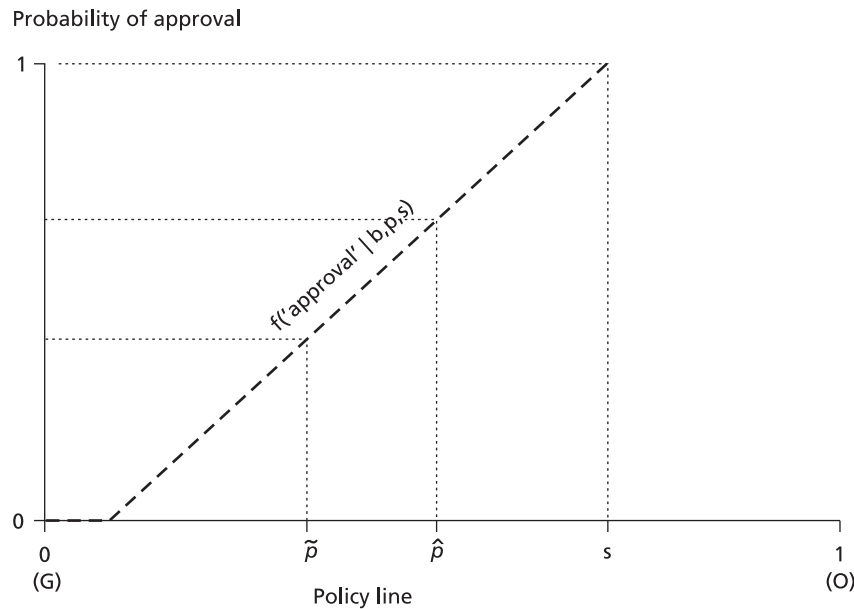


makes a proposal p which lies between 0 and the status quo. The opposition can either consent to p or threaten to exercise its veto. By assumption, if the opposition consents, the game is over and the outcome is $-(p) / -(1-p)$. The probability of a successful veto in the second chamber is determined by two parameters: first, by the distance between p and SQ , which captures the idea that a veto becomes more likely the more sharply the proposal deviates from the status quo (cf. Stone Sweet 1992), and second, by the ‘unfriendliness’ of the second chamber, captured by the variable b (with $b > 0$). b can mean many things, but primarily – and below empirically – it refers to the political partisan complexion of the second chamber, in our case the Bundesrat.

These assumptions have the following implications. The further p is away from SQ , the less likely an agreement in the second chamber will be,⁴ and the greater b is, the more likely it is that a legislative initiative will be vetoed. Mathematically, we therefore state the probability of a positive vote in the second chamber as a function of its unfriendliness (measured in b), and of the positions of the proposal p and the Status Quo point (SQ) in policy space. The likelihood of passage through the BR is expressed with the formula $1 - b(SQ - p)$.

However, we also want to capture the politics of the game. We assume that failure – either of a legislative initiative or of a veto – usually comes with non-negative electoral costs. We therefore follow Vanberg’s model of judicial review by introducing a factor of ‘electoral punishment’, c ($0 \leq c \leq 1$). Since electoral competition between government and opposition can be described as a zero-sum game, the electoral costs of the

⁴ We assume that the BR always consents to the status quo (the probability of consent equals 1). The probability that the BR will approve p decreases linearly with the distance from the SQ and equals 0 for $p = s-1/b$.

Figure 2 Party-political confrontation in case of a relative “friendly” second chamber

The government proposes \tilde{p} . The opposition is only prepared to compromise at \hat{p} . Consequently, the opposition tries to mobilize an oppositional veto in the BR.

one are the electoral gains of the other. Now we are able to draw the extensive game form of our simple ‘compromise or confrontation’ game (see Figure 1).

What is the subgame-perfect solution to this game?⁵ First, backward induction requires identifying the point in policy space at which the opposition is indifferent between accepting and rejecting the government’s policy proposal. For the opposition the trade-off is the fact that rejection incurs the risk of a failed veto, whereas acceptance means that the opposition will have to live with a policy further away from its own ideal position (see Appendix 1). We label this point of indifference \hat{p} . One implication of \hat{p} is that at a point close to SQ the costs attached to the risk of a failed veto outweigh the opposition’s policy sacrifices. In other words, the opposition always allows the government some room to manoeuvre – just how much room depends on b and c . The more likely a veto is in the BR (the larger b is) or the smaller the electoral costs of a failed veto are (the smaller c is), the closer \hat{p} must be to the status quo point. If the government proposes \hat{p} , the opposition accepts and the game ends. \hat{p} is always located between 0 and the status quo point. Whether the government proposes \hat{p} depends on the uncertainty about the voting outcome in the second chamber. If b falls below a critical value a government might prefer to propose a less moderate policy, \tilde{p} , thereby risking an oppositional veto and a confrontational vote in the second chamber (see Figure 2). The proposal \tilde{p} maximizes expected utility in case of a

⁵ All mathematical proofs may be found in the Appendix.

confrontation with the opposition (see Appendix 2). This strategy is attractive only as long as b , the ‘unfriendliness’ of the second chamber, remains below a certain threshold (see Appendix 3). In case of a very adversarial Bundesrat a government will prefer to avoid confrontation and to use the – small – policy leeway granted by the opposition.

The central empirical implication of our argument is obvious. It is not in situations in which the opposition enjoys a strong position that we expect gridlock and intense inter-party conflict.⁶ However, we do expect intense party-political conflict under narrow majorities where both government and opposition hope to get through their uncompromising policy positions and, at the same time, to inflict damage on the reputation of their political antagonist.

Formally, our simple game has the following equilibria. In the case of a very unfriendly second chamber a government anticipates the political costs of a potential veto and compromises its own ideal position until its bill is acceptable to the opposition (the government proposes \hat{p}). However, if the opposition’s majority in the second chamber is uncertain, a government may be tempted to introduce a less moderate bill at \tilde{p} . This will then lead the opposition to reject the proposal and to threaten a veto. In such situations both government and opposition bet on a favourable vote in the second chamber. The second chamber in turn vetoes the proposal with a probability of $b(SQ - p)$.

Although so far we have discussed only the implications of our model for situations of divided government, the underlying logic of our argument has consequences for unified government as well. Under unified government, the opposition cannot credibly threaten a veto and the government succeeds in getting a less moderate bill through parliament and the second chamber. However, even here a government will not simply propose its own ideal point as long as some degree of uncertainty remains concerning voting behaviour in the BR (in terms of the model: as long as $b > 0$). So even under unified government legislative proposals tend to deviate from the government’s ideal point and acknowledge the necessity of political compromise with pivotal states.

Before we turn to our empirical analysis we would like to say a few words about the status of our model. Obviously, this model abstracts strongly from ‘real’ legislative procedures in the German political system. This is of the very nature of models, however, and therefore hardly qualifies as an argument against the model: ‘Models are to be used, not believed’ (Przeworski 1991: 30). A model becomes problematic only if it severely distorts the strategic context in which the central political actors act. In contrast, we think that our simple ‘compromise or confrontation’ game quite accurately captures the basic calculations of government and opposition in the German political

6 We will spell out in more detail below what we mean empirically by a ‘strong’ or ‘weak’ position in the BR.

system. Two critical points must be addressed in this respect. First, the model does not and is not intended to capture the *details* of mutual compromise, a process that takes place in compromise-building institutions like the mediation committee (*Vermittlungsausschuss*). We are not interested in modelling this process of mutual adjustment, but rather in discovering when government and opposition pursue confrontational strategies, and when they act cooperatively – and what policy results we can expect from their choice of strategy. Second, we assume that legislative failure (or ‘veto failure’) has non-negative electoral costs for the initiating party. We therefore do not consider constellations of the ‘blame game’ type (Groseclose/McCarty 2001) in which a government may value the mobilizing effect of an oppositional veto for its own electoral constituency. This is not to say that we think these constellations never occur in the German political system. However, given the very small number of government initiatives that in fact do fail each term, it seems justified to assume that, most of the time, German governments want to get their initiatives through parliament and the second chamber.

What hypotheses can we derive from our model? In this respect we would like to emphasize the following – at times quite counter-intuitive – implications of our argument, all open to empirical testing. As already mentioned, we expect strong confrontation between government and opposition, not in those situations in which majorities clearly diverge, but where majorities in the second chamber are narrow and contested. As a first testable implication we expect that the number of initiatives on which the first chamber produces a confrontational vote should be *smaller* if the opposition enjoys a strong position in the second chamber (H1).

H1: Under divided government, the share of those initiatives which produce a confrontational vote in parliament decreases as the opposition’s representation in the second chamber increases.

Similarly, our model lets us assume that whenever majorities are narrow in the second chamber a government will design its bills in order to win over pivotal states. Under these circumstances we are likely to observe more initiatives that are highly confrontational in parliament but which find rapid approval in the second chamber. We therefore expect H2 to hold:

H2: Under divided government, the number of initiatives which are confrontational in parliament but are approved in the first round by the second chamber is significantly higher under narrow majorities.

Related to this is our next hypothesis, which refers to the duration of the legislative process. Often, the time lag between initiation and final adoption of a law is interpreted as an indication of the deadlock or stalemate potential of divided government (see, for example, Cox/Kernell 1991: 243; Bräuninger/König 2000). In light of our argument, things might not be so simple. In the case of a narrow majority, a government drafts its bill in order to win over pivotal states. If the opposition enjoys a strong

position in the second chamber, we expect that the government's bill will already reflect 'political reality' and accommodate the opposition's ideal point. In other words, it remains unclear under which constellation legislation can be expected to take longer. However, the fact that – according to our argument – we should not be able to clearly discriminate between the two scenarios allows us to reject a common view of the effects of divided government, namely that legislative duration is a positive function of the opposition's strength in the second chamber. Therefore, our third hypothesis (H3) is as follows:

H3: Legislative duration does not increase with increasing opposition seat share in the second chamber.

One other important implication regarding the duration of the legislative process follows from our argument, and this applies to all situations in which majorities in the second chamber *change* during the legislative process. If a relevant institutional parameter like the majority complexion in the second chamber changes, the relevant actors have to adjust their legislative strategies. If, for example, the majority situation of the second chamber deteriorates for the federal government, we should be able to observe that legislation takes considerably longer. This leads us to our final hypothesis (H4):

H4: If the majority situation in the second chamber changes in favour of the opposition after a bill has been introduced into parliament, legislation will take substantially longer.

In Section 3 we test hypotheses 1 to 4 empirically. First, however, we present a short description of our dataset.

3 Empirical evidence

Data

To test our hypotheses, we constructed an extensive data set containing all German legislative proposals between 1976 and 2002, a total of 5,038 federal bills.⁷ The data set contains comprehensive information on every legislative proposal, including the initiating party, the approval requirements in the second chamber, the ministries and committees involved, and – of major importance – the various steps in the passage of the legislation. We have information on all major BT and BR votes, in particular on

7 Since 1972, the German Bundestag and Bundesrat have published bibliographical information on every federal legislative initiative. Data starting from 1976 can be found on the Internet at <<http://dip.bundestag.de>>.

the voting behaviour of government and opposition parties in the Bundestag. Combining these data with information on the party composition of the second chamber allows us to closely trace the consequences of divided and unified government for the legislative process.

However, not all 5,038 initiatives in the sample are relevant to our question. First, we had to omit all proposals which did not attain a majority in parliament and, as a result, were not passed on to the Bundesrat. These proposals are almost exclusively bills that the opposition introduced into parliament. Given that we are interested in the strategic adjustment of the government once it has lost its majority in the second chamber, the exclusion of these failed legislative proposals does not bias our analysis. Second, because our model applies only to bills which require the consent of the second chamber (*Zustimmungsgesetze*), we excluded all laws for which the Bundesrat has only a suspending veto. Third, a significant share of legislation (18 per cent of all proposals between 1976 and 2002) consists of uncontroversial ‘ratification’ bills, most prominent among them the ratification of international (bi- or multilateral) treaties. Such bills are routinely accepted unanimously in parliament. In order to avoid these bills biasing our results, we excluded them from further analysis. We also had to exclude constitutional amendments which require a two-thirds majority, as well as laws on which party leaderships declared a free vote, mainly on moral issues, such as abortion. This still leaves us with a comfortable 1,038 cases on which to base the following analysis.

In order to test our hypotheses we also need to specify what we mean by narrow or uncertain majorities. Given that we can observe only a limited time period, a limited number of federal states with a limited incidence of actual coalition changes both at the federal and the state level, the party-political composition of the Bundesrat is not a continuous variable. Therefore we distinguished three different scenarios (see also König/Bräuninger 1998; Schindler 1998). The first scenario corresponds to a classical ‘unified government’ situation, in which the government parties hold the majority of seats in the BR. The second scenario is the reverse situation of ‘divided government’ in which the opposition holds more than 50 per cent of BR seats. In both scenarios uncertainty about the BR vote is comparatively low.

As already mentioned, Germany’s multiparty system and the frequency of (incongruent) coalition governments between federal and state level often leads to a party-political composition in the second chamber in which neither the government nor the opposition has a majority. It is in these situations that uncertainty about a BR vote is highest. Here the pivotal BR actors are the so-called ‘incongruent’ coalitions composed of parties that find themselves in both government and opposition at the federal level.⁸ However, not every situation in which neither the government nor the op-

8 Usually, coalition agreements foresee that a state shall abstain from voting in the second

position enjoys a strong position in the second chamber can qualify as an ‘uncertain majority’. Given that the voting procedure in the second chamber requires positive votes, the degree of uncertainty depends on the number of state governments that the federal government needs to bring into its own camp. The federal government can hope to get a bill through the BR only if it needs to win a *limited* number of ‘swing states’. We therefore define our third ‘high uncertainty’ scenario as a situation in which a government holds at least 35 per cent of the BR votes (but less than 50 per cent) and thus needs to win only an additional 15 per cent of state votes. With a total of 69 seats in the second chamber, this is equivalent to winning over two of the 16 states: a large one with six seats and a medium-sized one with four or five seats. If the vote share of the government lies below this threshold – that is, if a government needed to convince more than two incongruent or oppositional states – we regard the BR majority as a clear opposition majority.⁹ We now turn to our empirical evidence.

Results

According to our first hypothesis we should be able to observe a connection between voting behaviour in the Bundestag and the composition of the majority in the Bundesrat. More specifically, we expect that under divided government the proportion of controversial laws adopted in the Bundesrat *decreases* with the strength of the opposition in the second chamber. This prediction clearly contradicts common views about divided government which often assume a positive relation between opposition strength and conflict intensity. With respect to voting behaviour in the Bundestag we differentiated between a consensual vote (adopted by unanimous vote, few dissenting votes, or opposition abstention) and a contentious vote (adopted against the votes of the major opposition party). For 72 legislative proposals accepted by the Bundestag (seven per cent of our data), we were not able to establish the precise voting behaviour of the opposition in the Bundestag because neither the bibliographical documentation of the Bundestag nor the parliamentary protocols had recorded this information. We excluded these cases from the test of Hypotheses 1 and 2. Our cases are therefore restricted to 966 proposals.

As can be seen from Table 1, we find intensified party-political confrontation in parliament in situations of uncertain majorities in the second chamber. In these situa-

chamber if coalition partners disagree about an issue on the agenda. Abstentions count as negative votes, which would favour the federal opposition. However, coalition agreements are not legally binding and numerous breaches of this rule show that on highly politicized questions contractual agreements alone are not enough to predict state voting behaviour.

9 Our basic findings do not change substantially, but become slightly weaker if we use the three-fold classification without the threshold: a government majority in the BR, an opposition majority, and a neither–nor situation.

Table 1 Proportion of legislative proposals, approved in the BT against the votes of the opposition

	Government majority	Opposition majority	Uncertain majority
Count	80/283	112/450	78/233
Proportion	0.28	0.25	0.33

N = 966; Pearson Chi-Square = 5.6418 (significant at 0.1); Likelihood Ratio = 5.5653 (significant at 0.1).

tions one-third of all proposals that were adopted in the Bundestag were accepted against the votes of the opposition. This share is not only clearly higher than in the classical divided government scenario (25 per cent), but it is even higher than under unified government (28 per cent). Contrary to common perceptions, but in line with our argument, strong party-political conflict erupts particularly at times when neither the opposition nor the government enjoy a strong position in the Bundesrat.

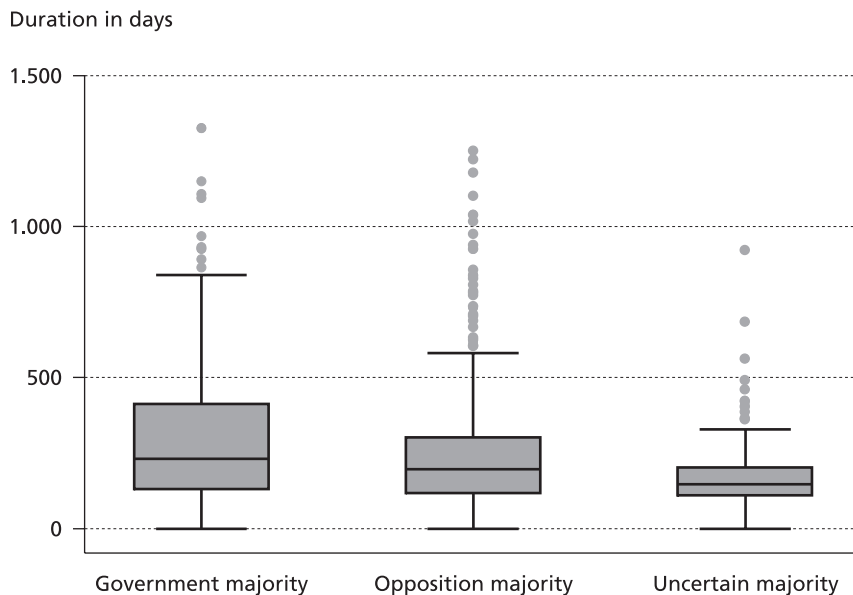
Table 2 Proportion of legislative proposals, approved by the BR after a negative opposition vote in the BT

	Government majority	Opposition majority	Uncertain majority
Count	74/76	35/123	38/71
Proportion	0.97	0.28	0.51

N = 270; Pearson Chi-Square = 89.7996 (significant at 0.001); Likelihood Ratio = 108.6799 (significant at 0.001).

Further evidence in support of our argument is provided by a test of H2. Table 2 presents the voting behaviour in the second chamber for all proposals that were accepted against the vote of the major opposition in the Bundestag (N = 270). Again, it becomes clear that the common dichotomous view which distinguishes only between unified or divided government misses important strategic features of the context in which government and opposition operate as rational actors. Table 2 shows that if a narrow majority prevails in the second chamber the government has – as we assumed in Hypothesis 2 – a bigger chance of rapidly winning approval in the second chamber. More than half of all the proposals approved against oppositional votes in the Bundestag while an uncertain majority prevailed in the BR are accepted immediately by the Bundesrat. In situations of a clear opposition majority, the threat of veto is more credible and only about a quarter of the bills rejected by the opposition in parliament passes the second chamber in the first round.

It is often assumed that the length of the legislative process tells us something about the blocking potential of the opposition under divided government (see Cox/Kernell 1991: 243). In contrast we hypothesized in H3 that we should *not* be able to see a linear positive relationship between opposition strength in the second chamber and legislative duration. In accordance with our expectations Figure 3 clearly shows a non-linear relationship between the party complexion of the BR and the time that passes

Figure 3 Legislative duration with varying majority complexion of the BR

Note: Majority complexion is measured at the time of the final BR vote.

between the introduction of a bill to Parliament and the final vote in the Bundesrat.¹⁰ Surprisingly, law making takes longest in situations of unified government (an average of 293 days). The legislative process is about two months shorter when the opposition has a strong majority in the second chamber (an average of 250 days). Bills are adopted most quickly under an uncertain majority in the second chamber (an average of 167 days).

How can we explain the long decision-making process under unified government? It seems that in this case governments invest more time in securing a compromise with state governments 'of the same colour' in order to avoid open intra-party conflict. This apparently prolongs the overall legislative process considerably. Federal-regional coordination cannot, on the other hand, take place before the introduction of a legislative proposal because the official legislative initiative serves as a credible political commitment by the government to address a certain political issue. To some extent our finding might also have a methodological explanation: due to the systematic vote losses of government parties in state elections, the average time span of uncertain majorities between 1972 and 2002 is considerably shorter than the periods of clear opposition majorities. Consequently, federal laws under narrow majorities could not have

¹⁰ We measure legislative duration as the time that elapses between the first introduction of a bill into parliament or second chamber and the final vote in the Bundesrat. According to the German Basic Law, the federal government, the Bundestag, party factions in the parliament and state governments have the right to initiate legislation.

been very long because the periods of uncertain majority themselves were temporally limited. Therefore, we cannot rule out that a data bias drives part of the result in Figure 3.

However, while pure legislative duration remains a problematic indicator of divided government's legislative consequences, our data allow us to trace the effects of *changes* in the majority complexion of the Bundesrat *during* the legislative process. We expected that legislation would take longer if the majority in the second chamber shifted in favour of the opposition. Our results are presented in Table 3. The first clear message of Table 3 is that the number of cases shows the impact of the German midterm cycle: federal governments were more frequently confronted by a deterioration of their position in the BR ($N = 169$) than with an improvement ($N = 26$). If the party-political weight in the second chamber tilts against the government, we can observe a clear impact on legislation duration. In this case, a legislative proposal needs on average 307 days to get through first and second chamber, 82 days longer than under clear divided government. Once again, the effects of divided government are not obvious but can be traced if the strategic considerations of political actors are taken into account.

Table 3 Legislative duration during different majority complexion in the BR

Majority complexion	N 1,036	Legislative duration			
		Average in days	Minimum in days	Maximum in days	Standard deviation
Government majority (GM)	264	291	10	1,323	227
Opposition majority (OM)	396	225	6	1,249	168
Uncertain majority (UM)	181	159	2	682	96
Improvement	26	239	57	763	189
Deterioration	169	307	38	1,221	260

4 Conclusion

Does divided government make a difference? Previous studies strongly disagree on this point. The main reason for the long-lasting controversy in political science seems to be the lack of clear empirical evidence that documents the direct blocking potential of divided government. However, looking for direct effects such as the complete failure or substantial delay of a legislative process might be the wrong approach. We took our inspiration from the judicial review literature and suggested that measuring anticipations of a veto is a far more promising research strategy than measuring actual vetoes. Specifically, our central expectation was that clearly diverging majorities between the first and second chamber will *not* lead to blockage and intense party-political conflict because a rational government will foresee the opposition's veto potential.

Rather, it is when neither government nor opposition enjoy a clear majority in the Bundesrat that antagonistic party-political conflict is most likely to occur. It is in these situations that the government speculates on breaking the opposition's political resistance in order both to damage its political reputation and to get through a policy that is closer to its own ideal point. The opposition, in turn, hopes to veto the government's bill, thereby protecting the status quo and inflicting significant political damage on the government.

The German political system provides an ideal testing ground for these hypotheses. The available evidence strongly suggests that the consequences of divided government are indeed mainly indirect and non-linear – most manifest in times of narrow or uncertain majorities, latent in times of strong opposition control of the second chamber. One important implication for further research is that the common simple binary distinction between unified and divided government misses important strategic aspects of the legislative bargaining process. Such a dichotomous distinction also hides the important empirical differences between situations of certain and uncertain majorities.

Do our findings for the German case provide insights for other bicameral systems? We think they do. Similar to our results, Thorson (1998) found that the frequency of interparty logrolls depends on how strongly divided Congress is, with partisan conflict being more likely in situations of uncertain majorities. While the effects in the context of the US political system may be less clear-cut given that party discipline is much lower than in Germany, basically the same logic should apply. However, we must leave it to future research to investigate the logic of 'legislative autolimitation under divided government' in a political and institutional context different from the German one.

Appendix

1 Dominant strategy of the opposition

The opposition can follow two possible strategies: it can threaten a government's policy proposal with a veto or it can abstain from a veto threat. We look for the threshold value \hat{p} , for which the opposition is indifferent between those two strategies. For all policy proposals p that lie below \hat{p} (and hence closer to the ideal point of the government), the opposition tries to mobilize a veto in the second chamber. For all policy proposals p that lie above \hat{p} (and hence closer to the ideal point of the opposition), the opposition withdraws from a veto threat.

For the threshold value \hat{p} , the opposition's expected gains from the two strategies must be the same, hence:

$$\begin{aligned}
 & [1-b(s-p)][p-1-c] + [b(s-p)][s-1+c] = p-1 \\
 & \Leftrightarrow \\
 & (1-bs+bp)(p-1-c) + (bs-bp)(s-1+c) - p + 1 = 0 \\
 & \Leftrightarrow \\
 & bp^2 - 2bpc - 2bps + 2bsc + bs^2 - c = 0 \\
 & \Leftrightarrow \\
 & p^2 - (2s+2c)p - \frac{c}{b} + 2sc + s^2 = 0
 \end{aligned}$$

with the following solutions:

$$p = s + c \pm \sqrt{c^2 + c/b}$$

Since $p < s$, there is only one possible solution \hat{p} for $p = s + c - \sqrt{c^2 + c/b}$.

2 Utility maximization of the government in case of an oppositional veto threat

In case of an oppositional veto, the expected utility of the government is:

$$EU_G = [1 - b(s-p)][-p+c] + [b(s-p)][-s-c]$$

$$\Leftrightarrow$$

$$EU_G = (1 - bs + bp)(-p+c) + (bs - bp)(-s-c)$$

$$\Leftrightarrow$$

$$EU_G = -bp^2 - p + 2bcp + 2bsp + c - bs^2 - 2bsc$$

Setting the first-order derivation equal to 0 yields the optimal proposal \tilde{p} :

$$\frac{\partial(EU_G)}{\partial p} = -2bp - 1 + 2bc + 2bs$$

$$\Leftrightarrow$$

$$-2bp - 1 + 2bc + 2bs = 0$$

$$\Leftrightarrow$$

$$p = s + c - \frac{1}{2b}$$

We refer to this threshold as \tilde{p} . It maximizes the government's utility because:

$$\frac{\partial^2(EU_G)}{\partial p^2} = -2b \leq 0$$

3 Dominant strategy of the government

The government prefers the compromise solution \hat{p} if the expected gains of \hat{p} exceed the expected gains of the confrontation with the opposition at \tilde{p} , thus:

$$\begin{aligned}
 -(s+c-\sqrt{c^2+c/b}) &> \left[1-b(s-(s+c-\frac{1}{2b}))\right] \left[-(s+c-\frac{1}{2b})+c\right] + \left[b(s-(s+c-\frac{1}{2b}))\right] [-s-c] \\
 \Leftrightarrow \\
 -(s+c-\sqrt{c^2+c/b}) &> -(s+c-\frac{1}{2b}) + 2bs(s+c-\frac{1}{2b}) - b(s+c-\frac{1}{2b})^2 + c - 2bsc + 2bc(s+c-\frac{1}{2b}) - bs^2 \\
 \Leftrightarrow \\
 \sqrt{c^2+c/b} &> \frac{1}{4b} + c + bc^2 \\
 \Leftrightarrow \\
 \text{with} \\
 b &> \frac{-1 \pm \sqrt{2}}{2c}
 \end{aligned}$$

Since $b > 0$, there is only one possible solution for b at

$$b > \frac{-1 + \sqrt{2}}{2c}$$

Thus, the dominant strategies of the opposition and the government are:

If $b > \frac{-1 + \sqrt{2}}{2c}$, the government proposes \hat{p} and the opposition does not exercise a veto threat.

If $b < \frac{-1 + \sqrt{2}}{2c}$, the government proposes \tilde{p} and the opposition threatens to veto this proposal.

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